

NTSB Order No. EA-3976

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 27th day of August, 1993

Respondent .

Docket SE-11310

Respondent has appealed from the oral initial decision of Administrative Law Judge Joyce Capps, rendered at the conclusion of an evidentiary hearing on August 7, 1991.¹ By that decision, the law judge affirmed an order of the Administrator charging respondent with violations of sections 91.29(a) and 91.9 of the

The Administrator filed a brief in reply.

Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).² The law judge reduced the period of suspension of respondent's airman certificate with airline transport pilot privileges from 60 to 30 days.³ Although respondent had filed a report with the National Aeronautics and Space Administration (NASA) under the Aviation Safety Reporting Program (ASRP), the law judge found that respondent's actions were deliberate, not inadvertent, and as such, respondent was ineligible to utilize the ASRP.

After consideration of the briefs of the parties and the record below, the Board concludes that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the initial decision. For the reasons that follow, we deny respondent's appeal.

The pertinent facts are undisputed. On March 23, 1990, respondent acted as pilot-in-command of N986VJ, a USAir DC-9 on a flight from Lambert-St. Louis International Airport to Pittsburgh International Airport (PIT). Prior to the flight, FAA inspector

²Respondent allegedly violated FAR sections 91.29(a) and 91.9 (now 91.7(a) and 91.13, respectively) of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91).

These regulations read as follows:

§ 91.29 **Civil aircraft airworthiness.**

(a) No person may operate a civil aircraft unless it is in an airworthy condition.

§ 91.9 **Careless or reckless operation.**

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³The Administrator did not appeal the reduction in suspension period.

Randall Skyles conducted a ramp inspection of the aircraft and discovered that when open, the forward cabin door was not secure against the fuselage as it was designed to be, because its gust locking mechanism was malfunctioning.⁴ When he alerted respondent to the problem, respondent looked at the door and demonstrated that it would lock in the open position against the fuselage if the handle was held while the door was being pushed against the fuselage. The two men discussed the situation: respondent believed that the door was working properly in its present condition, while the inspector disagreed. They decided to call the maintenance department to have a mechanic look at it. After the mechanic estimated that it would take between two and three hours to fix the door, the inspector left, under the assumption that the problem would be corrected. Mr. Skyles testified that half an hour later, he saw the aircraft taxiing down the runway for takeoff. Although the mechanic neither worked on the door latch nor signed the aircraft logbook, respondent decided that the door did not pose a problem and chose to proceed with the flight to PIT.

On appeal, respondent argues that the Administrator failed to sustain his burden to prove by a preponderance the violations

⁴The inspector testified that he was the holder of an Airframe and Powerplant (A&P) certificate and a private pilot certificate and had considerable experience as an aircraft mechanic, including experience as a DC-9 flight mechanic. Transcript (Tr.) at 14-15.

He had also told respondent that several adjustment bolts on the floor of the cabin door were loose. The mechanic tightened these bolts before the flight.

of FAR sections 91.29(a) and 91.9. He maintains that the Administrator did not introduce evidence to show that a door latch which could only be engaged manually rendered the aircraft unairworthy. Respondent's argument rests on the absence from both the aircraft's type certificate and the FARs of a specific requirement for an automatic hold-open latching mechanism. Further, he claims that the reason the automatic door latch is not on the Minimum Equipment List (MEL) is because items that are not required by the type certificate are not included on the list.⁵

An airworthy aircraft must both conform to its type certificate and be in a condition for safe operation. Administrator v. Doppes, 5 NTSB 50 (1985).⁶ To prove a violation of section 91.29(a), the Administrator must show that the airman operated an aircraft that he knew or reasonably should have known was not airworthy. Administrator v. Parker, 3 NTSB 2997 (1980). See also Administrator v. Gasper, NTSB Order No. EA-3242 (1991).

There is no question that holders of ATP certificates are held to the highest degree of care. It is also true that a pilot's actions should be judged against what a prudent pilot would have

⁵The MEL contains items that may be inoperative without rendering the aircraft unairworthy. The automatic door latch open mechanism was not on the list.

⁶An airworthy aircraft "(1) must conform to its type certificate, if and as that certificate has been modified by supplemental type certificates and by Airworthiness Directives; and (2) must be in condition for safe operation." Doppes at 52, n.6, citing Section 603(c) of the Federal Aviation Act of 1958 (49 U.S.C. §1423(c)).

done in the same instance, "based upon conditions ... of which the pilot was aware or which he could have reasonably anticipated." Administrator v. Baxter, 1 NTSB 1391, 1394 (1972).

We believe there was sufficient evidence to support the law judge's finding that N986VJ "was not type certificated for the locking mechanism to be put into place by the use of the vertical bar." Tr. at 175. Contrary to respondent's assertion, a preponderance of the evidence here supports a finding that respondent operated an unairworthy aircraft.⁷ An FAA aerospace engineer (Systems and Equipment Crash Readiness Branch), who is specifically involved in aircraft certification and DC-9 mechanical systems, testified that in order to be certified, the DC-9 must have emergency exits that allow an unobstructed passage to the outside. Tr. at 85-87. He explained that the automatic door latch ensures that the door will stay open, regardless of the aircraft's attitude, thereby facilitating evacuation in an emergency situation.⁸ Tr. at 81. Both he and Mr. Skyles testified that they believed the aircraft was not airworthy

⁷That the aircraft could be flown does not necessarily mean it was airworthy. It is well-settled that an aircraft that is flyable may nonetheless be considered unairworthy. See Administrator v. Brodnax, 3 NTSB 2795, 2797 (1980); Administrator v. Blackwell, 2 NTSB 360, 361 (1973).

⁸Respondent states, "[t]he situation is no different from a flight where the timer on a coffee maker is inoperative. Such a malfunction would not be on the MEL and would not cause the aircraft to be unairworthy since this feature is not part of the type certification." Respondent's Brief at 12. We disagree with his analogy. As explained supra, a means of unobstructed egress is required by the type certificate. A dangerous situation could develop if, during an emergency, the door could not be held open.

without an operable door latch. Thus, their testimony supports a finding that it was unsafe to operate the aircraft in its current state.

Respondent, as the only witness on his behalf, testified that he believed (and still maintains) the aircraft was completely airworthy when he operated it. He asserts that he briefed the flight attendants on how to secure the door by manipulating the handle, pushing the door, and engaging the latch. Therefore, he maintains, no danger arose from the operation of the door in this manner. As the Administrator points out however, the passengers were not aware of this method to secure the door. In addition, if an emergency arose and the aircraft came to rest in an unusual position, it could be difficult, if not impossible, to keep the door open without the automatic latch. Tr. at 95.

We concur with the law judge's assessment that respondent was informed that the aircraft was unairworthy. Inspector Skyles advised respondent that the door was not working correctly and indicated that a mechanic should be called. This should have alerted respondent that a potential problem existed. He chose, however, to substitute his judgment for that of an FAA inspector with an A & P certificate.

After finding that respondent had operated an aircraft that was not airworthy, the law judge determined that respondent was ineligible for a waiver of sanction as prescribed by the ASRP. Under the ASRP, pilots who timely file an incident report with

NASA may avoid any certificate suspension stemming from that incident provided that, among other things, the violation was inadvertent and not deliberate. See FAA Advisory Circular, AC No. 00-46C, ¶9(c)(1) (Feb. 4, 1985).

In Ferguson v. N.T.S.B., 678 F.2d 821 (1982), the Ninth Circuit Court of Appeals examined the distinction between inadvertent and deliberate acts, as they apply to the ASRP. The court said deliberate conduct involved "a purposeful choice between two acts.... [A] pilot acts inadvertently when he flies at an incorrect altitude because he misreads his instruments. But his actions are not inadvertent if he engages in the same conduct because he chooses not to verify his altitude." Id. at 828.⁹

Given the circumstances of the instant case, the shelter of the ASRP may not be afforded to respondent. Although he maintains that he did not deliberately seek to operate an unairworthy aircraft, it is uncontroverted that he was put on notice of a problem with the door. Instead of having it corrected or signed off by a mechanic, respondent knowingly chose to continue with the scheduled flight. We believe that the law judge had sufficient basis upon which to conclude that respondent's operation of the aircraft was deliberate and not

⁹We also cited Ferguson in, for example, Administrator v. Wood, 5 NTSB 2390 (1987)(low flight over congested area not inadvertent) and Administrator v. Smith, 5 NTSB 1560 (1986)(helicopter pilot who continued flight after being advised of hazardous weather conditions was not entitled to protection of the ASRP, as the violations were not inadvertent).

inadvertent.¹⁰

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, is affirmed; and
3. The 30-day suspension of respondent's airman certificate shall begin 30 days after service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. LAUBER, Member, did not participate.

¹⁰Accord Administrator v. Levine, NTSB Order No. EA-3880 (1993) (respondent's operation of an aircraft with a missing wing tip was not inadvertent as he was aware that it was missing and had received a condition notice from the FAA).

¹¹For the purpose of this order, respondent must physically surrender his certificate to a representative of the Federal Aviation Administration pursuant to FAR § 61.19(f).